BLANK

PAGE

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 14 1966
JOHN F. DAVIS, CLERK

No. 581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NEW ENGLAND MOTOR RATE BUREAU, INC., *et al.*,
Appellants

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

GUY H. POSTELL
FRANK D. HALL
1776 Peachtree Street, N.E.
Atlanta, Georgia 30309

JOHN W. MacFADDEN
816 East Ohio Street
Chicago, Illinois 60611

HARRY C. ALLEN
Transportation Building
Washington, D.C. 20006

ROLAND RICE
ROBERT S. CARPENTER
JOHN A. TERRIBERRY
RICHARD K. SIMON
815 Transportation Building
Washington, D.C. 20006

Of Counsel

PETER T. BRADLEY
R. EDWIN BRADY
1616 P Street, N.W.
Washington, D.C. 20036

BRYON BEA, JR.
BURTON, FULLER
917 Midway Building
Washington, D.C. 20004

LeGRAND A. CARLSTON
E. L. PEARSON, JR.
P. O. Box 5143
Transportation Annex
Denver, Colorado 80217

GEORGE D. MICHAELSON
P. O. Drawer 647
Kansas City, Missouri 64141

Paul Brown & Associates, Law Printers, Washington, D.C.

BLANK

PAGE

TABLE OF CONTENTS

	Page
PREFATORY STATEMENT	1
THE DIVERSE DEFINITIONS	4
THE RESTRICTED RATES	8
FREIGHT AND EXPRESS, OR JUST EXPRESS?	10
THE SUBSTANTIAL QUESTION	10

TABLE OF CITATIONS

Ace Lines, Inc. v. United States, 197 F. Supp. 591 (1960)	5
American Trucking Associations, Inc. v. United States, 355 U.S. 141 (1957)	11
Churchill Tabernacle v. Federal Communications Commission, 160 F. 2d 244 (1947)	5, 6
Coyle Lines v. United States, 115 F. Supp. 272 (1953)	7
Movers Conference of America, et al., v. United States, 205 F. Supp. 82 (1962)	7
National Labor Relations Board v. Baltimore Transit Co., 140 F. 2d 51 (1944)	5, 6
Railway Express Agency, Inc., Extension—Charlottesville, 94 M.C.C. 62 (1963)	4
Rock Island Motor Transit Co.—Purchase—White Line Motor Freight, 40 M.C.C. 457. (1946), aff'd 55 M.C.C. 567 (1949)	3
Transportation Activities of Arrowhead Freight Lines, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955)	10
WOKO, Inc. v. Federal Communications Commission, 153 F. 2d 623 (1946)	5

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., *et al.*,
Appellants

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

PREFATORY STATEMENT

In the course of lengthy administrative proceedings involving numerous lawyers and successive submissions of argumentative pleadings,[1] many contentions are vig-

[1] In the proceedings before the Commission, 27 lawyers entered their appearances for one or more protestants. At the conclusion of the hearings, the Examiner himself heard oral argument, subsequent to which briefs were filed. Thereafter, exceptions to the recommended report of the Examiner were filed and replies to exceptions were filed, following which oral argument before the entire Commission took place.

orously urged, some of which are without merit and some of no dispositive significance any way. It is, therefore, no answer to contentions seriously pressed at this stage of this long litigation that the appellants, or some of them, have in the past urged matters which are not now before this Court. Thus, it is neither accurate nor fair to allege, as has the Railway Express Agency,[2] that these appellants insist that Express service (1) refers to a particular type and size of shipment, (2) requires a rate higher than that charged by appellants, and (3) prohibits the provision of any service provided by any of the appellants.

By the same token, it is hardly helpful to the Court to suggest, as did the government,[3] that the appellants object to the use by the Railway Express Agency "of containers which will enable it to compete more actively for larger express shipments," or to suggest, as did the Small Shipments people,[4] that their purpose is to prevent the agency from providing a small shipment service in the most economic manner possible.

Finally, we especially resent, as should the Court, the macabre statement at page 16 of the motion of Railway Express Agency, that "appellants particularly object to the commodity exclusions in the container tariff, *e.g.*, human remains."

None of the foregoing diversionary representations really faced up to the focal contentions upon which appellants here rely. We have told the Court, first, that the Commission has unlawfully adopted and is

---

[2] Pages 6 and 7 of its motion.

[3] Page 6 of its motion.

[4] Pages 2 and 3 of the motion of the National Small Shipments Traffic Conference, et al.

presently applying different definitions of express service in differing types of cases. We say, second, that an express company may not lawfully so condition its holding out to transport at a reduced rate as to exclude from that particular service those commodities which are expensive to transport and which are the express obligation of the express company to accept and carry. And we say, third, that an express company cannot qualify to engage in freight service by mere fact that it also holds out and performs an express service at other and higher rates.

The remaining two points on which we especially rely are that, as a result of the failure of the Interstate Commerce Commission to limit the Railway Express Agency to the provision of a true express service, two serious and destructive violations of law and Congressional policy will ensue. First, there will be created a nation-wide freight carrier with motor carrier operating authority which has never met the statutory standard of public convenience and necessity, and, second, the Congressional policy against entry of the railroads into the field of motor carrier transportation will be frustrated.[5]

To the extent, and it is minor, that appellees have directed their motions to the foregoing five basic contentions, we answer below.

---

[5] The decision represents a complete reversal of the policy articulated in *Rock Island Motor Transit Co.—Purchase—White Line Motor Freight*, 40 M.C.C. 457, 473-74 (1946), aff'd on further hearing, 55 M.C.C. 567 (1949), that a railroad applicant for motor-carrier authority must not only prove as any other applicant that the service is required by the public convenience and necessity, but also has a "special burden" to establish that special circumstances negative any disadvantage to the public flowing from the railroad control.

THE DIVERSE DEFINITIONS

The principal foundation upon which appellants rest their case is that the Commission has in this case changed its definition of express service. The absence of any comment on that point by either the government or the Small Shipments people is itself most eloquent. It is also understandable when attention is given to the effort of Railway Express to cope with that phase of the case.

Commencing at page 9 of its motion, Railway Express denies that different definitions have been applied, saying that in the licensing cases all the Commission was talking about was "the practical scope" of the operations which Railway Express might be expected to institute once the authorization had been granted. About the only thing good that can be said of that argument is that it is ingenious because the fact is that it cannot be squared with what the Commission itself, in solemn language said it was to do. A typical example of such categorical expression by the Commission was quoted by us at page 6 of our jurisdictional statement. For convenience we reproduce it below:

> "* * * [P]rotestants * * * have given expression * * * to considerable apprehension that the Commission in granting authority to REA is giving birth to a nationwide railroad-controlled motor carrier which would be fully competitive with general freight carriers, * * *.
>
> "* * * Protestants may rest assured, * * *, that we shall continue to scrutinize REA's operations with a view to forestalling any developments which threaten to change the character of the services provided by it to the serious detriment of other carriers. * * *"[6]

---

[6] *Railway Express Agency, Inc., Extension—Charlottesville,* 94 M.C.C. 62 (1963), at pages 76 and 77.

Similar expressions by the Commission in other operating rights cases were cited at page 11 of our jurisdictional statement. Our entire point is that the Commission *has* in this case changed the definition of express service from what it had said that service to be in the operating rights cases. That change has had the effect of eliminating the very restriction which the Commission had assured the motor-carrier industry would be preserved and enforced.

In a further effort to divert the thrust of our argument, Railway Express says that even if the Commission *has* changed its view of what constitutes express service, no invalidity of the present definition is thereby demonstrated. Cited are *Ace Lines Inc.* v. *United States,* 197 F. Supp. 591 (1960) and a long list of other cases assertedly holding that the Court ought not to concern itself with a lack of consistency in the Commission's own decisions.

The cited cases generally fall into three categories: those where the court held that the rule of *stare decisis* does not apply to administrative agencies; those where the agency reached its different conclusion on the basis of different facts and after a clarifying Supreme Court decision (*National Labor Relations Board* v. *Baltimore Transit Co.,* 140 F. 2d 51 (1944)); and those where the agency was applying a newly established policy to license renewal (*Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244 (1947), *WOKO, Inc.* v. *Federal Communications Commission,* 153 F. 2d 623 (1946)). Most of the cases cited involved alleged inconsistencies occurring between unrelated decisions, that is, contentions that the administrative agency has treated different parties differently even though the factual situations were similar.

The three cases involving agency departures from prior holdings on the same subject are distinguishable from the instant proceeding. In the *Baltimore Transit* case, the National Labor Relations Board had administratively declined to take action on an earlier complaint of the union apparently on the ground that the National Labor Relations Act was not applicable. There was no adjudication by the Board on the question of jurisdiction or any other issue. The Court held that the Board was not precluded by this "administrative determination not to take action" from taking action at a later date, upon a new complaint and a different state of facts, when its jurisdiction had been made clear by intervening decisions of the Supreme Court and it appeared that the Act was being violated. In the *Churchill Tabernacle* case, the Federal Communications Commission had approved a contract of sale of a radio station from the church to a separately organized corporation and had issued renewal licenses to the station. The contract of sale reserved certain broadcast time to the church and contained a reverter provision. In the subsequent license renewal proceeding, the Commission concluded that the contract provisions made the renewal of the license contrary to the public interest. The Court held that the Commission's power to establish and apply to renewal applications new policies inconsistent with its prior decisions flows from the Commission's statutory duty to examine each application for renewal as an original proceeding to be determined on the basis of the public interest. This case is distinguishable from the instant situation where the Interstate Commerce Commission granted certificates authorizing a particular service without limitation to a specified term and subsequently in an unrelated pro-

ceeding, rendered a decision which effectively enlarged the operating authority without complying with the specific requirements of the Act. In *Coyle Lines* v. *United States,* 115 F. Supp. 272 (1953), the Court held that apparently inconsistent findings in an unrelated proceeding are not sufficient to overturn an agency order supported by substantial evidence in the record as a whole.

All of the cases cited by Railway Express are clearly distinguishable from the situation here before the Court where the motor carriers have been told in litigation against Railway Express that no operating authority issued to Railway Express will ever be used in competition with the motor carriers and, now in this case, that it will. Indeed, the creation of competition is one of the very bases upon which the government seeks to defend the Commission's decision, as is plain from page 5 of the government motion which reads in part as follows:

> "The Commission's decision *enhances competition* between express companies and motor carriers, results in improved service and lower rates to shippers, and conforms with the national transportation policy. (49 U.S.C. preceding § 1)" (Emphasis supplied)

The Commission may not so cavalierly tailor its decisions to fit its changing moods, especially with regard to interpretations which eliminate restrictions from certificates of operating authority. As the Court said in *Movers Conference of America, et al.,* v. *United States,* 205 F. Supp. 82, 86 (1962):

> "We conclude that the proposed order does redefine 'household goods' in a manner different from the existing definition commonly accepted

> within the industry by both the carriers and the Commission. In our opinion, the proposed redefinition narrows the term 'household goods,' excluding certain types of services previously thought to be contained within the meaning of the words involved. Since the Commission proposes to do this by a procedure other than that set forth in 49 U.S.C.A. § 312(a), the order is clearly erroneous in that it constitutes a deprivation of the rights of the household goods carriers without proper process of law. For that reason, the Interstate Commerce Commission is hereby enjoined from enforcing its order * * *."

THE RESTRICTED RATES

Although Railway Express and the Small Shipments people submitted arguments in opposition to our contention that the rates here at issue may not lawfully be restricted to exclude therefrom items which are expensive to transport, notably articles which require protection from excessive cold or heat, the government has declined to face up to the proposition. It is interesting to note, however, that the government urges in its contention that there has been no incursion by REA into the field of motor carrier transportation of freight, that "no such incursion could purposely be said to result so long as REA is not offering a lower-grade, non-express service by using containers."[7] The Small Shipments people argue precisely the contrary at page 5 of their brief where they say that REA has historically offered different grades of service at different rates and ought not to be foreclosed from maintaining a lower grade of service at cheaper rates.

To these appellants it seems ridiculous for REA and the Small Shipments people to be urging that there

[7] Page 5 of the Government's motion.

has been no departure in this instance from an express service and therefore no incursion by REA into the field of motor transportation of freight. The government itself endeavors to defend the Commission's decisions upon the ground that it "enhances" competition between express companies and motor carriers.[8] To say, as does REA at page 13, that this incursion is with respect to only a small amount of traffic is no answer at all. The Commission gave positive assurance to the motor carriers in the operating rights cases that there was to be no such incursion—and it issued certificates of operating authority to carry out that intent. Yet the fact remains that in this case it has permitted REA to publish and maintain rates which are on or below the level of the freight rates of the motor carriers and it has permitted Railway Express to condition those rates by the tariffs publishing them so as to make them inapplicable to the very type of shipment which is embraced within the third criterion of express service quoted by the government in footnote 2 on page 3 of the government motion. That third criterion requires an express company "to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from point of pick up to the point of delivery, * * *." If Railway Express is free to publish a special low rate applicable only for a described service which categorically relieves the express company from the necessity for giving "equally * * * careful handling" to the shipments moving therein as is given to shipment moving in *another* described service of Railway Express, then that agency is free to provide a freight service so long as it also provides an express service. This is precisely what the

[8] Page 5 of the Government's motion.

Commission said an express company could *not* do in the *Arrowhead* case[9] cited by the government as controlling in footnote 2 on page 3 of its motion.

FREIGHT AND EXPRESS, OR JUST EXPRESS?

In the final analysis, the Commission originally held that the container service is a lawful service by Railway Express Agency so long as the agency continues to perform the traditional type of express service that has become so familiar. Also in the final analysis the decision of the court below sustained the Commission on this finding because, said the court, Railway Express "holds itself out to transport the excepted items under its other tariffs."[10] The Small Shipments people would dismiss the argument by the tenuous observation that the fifth criterion intimates that there can be more than one structure of express rates and Railway Express avoids the argument by quoting the language of the court below. The short answer to both arguments, of course, is that in the *Arrowhead* case the Commission condemned the freight service even though Arrowhead had continued and was actually operating an express service at the same time. If that case controls this one as the court below and the Commission have both found, then the wrong result has obviously been reached.

THE SUBSTANTIAL QUESTION

Railway Express and the Small Shipments people all urge that this appeal presents no substantial question. Yet the government itself says that the Commission's decision is designed to *enhance* competition between the motor carriers and Railway Express. In-

---

[9] Transportation Activities of Arrowhead Freight Lines, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955).

[10] Jurisdictional Statement, page 4a.

asmuch as the tariff publication which describes the service to be rendered removes it from the category of express service, the competition which results is for freight. Not only is this competition contrary to the oft-expressed policy of Congress that there is to be no invasion by the railroads into the field of motor transportation but also it is an abrogation of a solemn assurance that was made by the Commission to the protesting motor carriers when it granted to Railway Express the authority to provide an *express service* over the public highways by its own motor vehicles. In this case the issues are so substantial as not only to justify plenary review by the court but also to demand it.

To sum up, the Commission quieted the fears of the independent motor carriers in the operating rights cases by assuring them that although its grants of authority put REA in the motor-carrier business, such grants, being limited to the performance of an *express service,* in no way threatened the ability of the independents to continue to perform *freight* service. Having accepted this assurance in good faith, the independent motor carriers are now faced—despite the Commission's earlier pronouncement—with the most vigorous competition by REA in the field of *freight service.* If this competition resulted from their unwillingness or inability to render an adequate freight service, the independent carriers could have no legitimate complaint, *American Trucking Associations, Inc.* v. *United States,* 355 U.S. 141 (1957), because the shipping public is entitled to such service. But the Commission has found no inadequacy in the *freight* service rendered by the independents. Rather, it has allowed REA to invade that field by the back door by holding that any transportation performed by REA's is "express service," regardless of the nature of the service actually rendered or the consist of the freight

involved. If the independent motor carriers are to be faced with the competition of REA in the field of general freight transportation, surely they have the right to assume that the Commission would not permit nationwide operations by this railroad subsidiary, except, at the least, upon the same showing that the Interstate Commerce Act imposes upon any motor carrier seeking to extend its operating authority, i.e., proof of public convenience and necessity. Yet, REA has never met this test. There has been no need for it to do so. The Commission's construction of its existing certificates, the language of which limits its operations to the transportation of traffic moving in "express service," has obviated any such need. This is a windfall bestowed by the Commission which has no counterpart in transportation history, and which violates the specific requirements of the statute which it administers.

Respectfully submitted,

GUY H. POSTELL
FRANK D. HALL
1375 Peachtree Street, N.E.
Atlanta, Georgia 30309

JOHN W. McFADDEN
316 East Ohio Street
Chicago, Illinois 60611

HARRY C. AMES
Transportation Building
Washington, D.C. 20006

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
RICHARD R. SIGMON
618 Perpetual Building
Washington, D.C. 20004

Of Counsel:

RICE, CARPENTER AND CARRAWAY
618 Perpetual Building
Washington, D. C. 20004

PETER T. BEARDSLEY
R. EDWIN BRADY
1616 P Street, N.W.
Washington, D.C. 20036

BRYCE REA, JR.
BURTON FULLER
917 Munsey Building
Washington, D.C. 20004

LeGRAND A. CARLSTON
Z. L. PEARSON, JR.
P. O. Box 5746
Terminal Annex
Denver, Colorado 80217

GEORGE D. MICHALSON
P. O. Drawer 647
Kansas City, Missouri 64141

DATED: November 14, 1966

END.